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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1771

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Petitioners,*

v.

CIVIL AERONAUTICS BOARD, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT AIR CALIFORNIA IN SUPPORT OF CERTIORARI

J. WILLIAM DOOLITTLE
PRATHER SEEGER DOOLITTLE
FARMER & EWING
1101 Sixteenth Street, N.W.
Washington, D.C. 20036

BORIS H. LAKUSTA
GRAHAM & JAMES
One Maritime Plaza
San Francisco, California 94111

Attorneys for Respondent Air California

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Under the provisions of Rule 21(6) of this Court's Rules, respondent Air California, an intervenor in the court below, supports the petition of the People of the State of California and the California Public Utilities Commission for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 14, 1977.

STATEMENT

Respondent Air California provides scheduled air service between various points within the State of California. Its routes and fares are regulated by petitioner California Public Utilities Commission, as are those of another intrastate carrier, Pacific Southwest Airlines (PSA). This proceeding is concerned with a conflict between the action of the California Commission in granting these carriers certain routes within the State of California and action of the respondent Civil Aeronautics Board in granting them certain exemptions.

In February 1975, the California Commission authorized Air California and PSA to provide service between South Lake Tahoe, California, and a number of other California points. Pursuant to this authorization, Air California inaugurated daily single-plane service between South Lake Tahoe, on the one hand, and Oakland, San Jose, San Francisco and Orange County, on the other, with connecting service to other points on its system. PSA began providing Lake Tahoe-Los Angeles and Lake Tahoe-Burbank single-plane service and connecting service between Lake Tahoe and San Diego.

In providing these services to and from Lake Tahoe, Air California and PSA wished to be able to attract passengers who might be going to, or coming from, places on the Nevada side of the Tahoe Basin. Lest the solicitation of such traffic be thought to jeopardize their status as intrastate carriers, both airlines applied to the Civil Aeronautics Board for exemptions permitting them to offer "interstate air transportation" on their intrastate services to and from Lake Tahoe. (The Board had previously granted such an exemption to a

State-certificated Lake Tahoe carrier that has since gone out of business.)

In June 1975, the Board granted Air California and PSA the requested exemptions, subject, however to certain conditions. Air California was restricted against holding out any Lake Tahoe service except to and from Oakland and San Jose, and PSA was limited to Lake Tahoe-Los Angeles and Lake Tahoe-Burbank service. The Board stated that these restrictions "are necessary because, in our view, air service at Lake Tahoe is interstate in nature by definition" (Petition, App. 29). The agency did not explain why this view of the character of Lake Tahoe service required the restrictions it imposed.

Adherence to the restrictions that the Board attached to its exemptions would have precluded Air California from continuing to hold out its direct Lake Tahoe-San Francisco and Lake Tahoe-Orange County services and all of its Lake Tahoe connecting services, and would require PSA to discontinue holding out Lake Tahoe-San Diego connecting service. For this reason, Air California and the California Commission sought reconsideration of the Board's order. The Board, however, reaffirmed its decision (Petition, App. 41-42).

Rather than eliminate important State-authorized air services, Air California elected to forgo the benefits of the Board's exemption. Consequently, Air California continues to provide the pattern of service it initiated in early 1975, without holding out the availability of its services to passengers traveling to and from Nevada. PSA, on the other hand, decided to avail itself of the Board's exemption, and it offers its Lake

Tahoe services to interstate passengers. As a result, it was obliged to cease holding out the Lake Tahoe-San Diego services authorized by the California Commission.

The California Commission petitioned the Court of Appeals for the District of Columbia Circuit for review of the Board's decision. It contended that the restrictions imposed by the Board in its exemption order infringed upon the State's exercise of its regulatory jurisdiction, and that the sole ground cited by the Board for imposing those restrictions—that "air service at Lake Tahoe is interstate in nature"—was without legal or factual support. Air California intervened on behalf of the California Commission's position.

In its decision the court below acknowledged that, in making its finding on the nature of air service at Lake Tahoe, "the Board spoke too soon and too loosely" (Petition, App. 7). The court nevertheless affirmed the agency's order. Noting that the Board had subsequently instituted an evidentiary proceeding in which a record as to the nature of Lake Tahoe service would presumably be developed, the court concluded that the Commission's appeal "is not timely. The issue is presently too theoretical and abstract" (*ibid.*).

ARGUMENT

The court below affirmed an action of a federal regulatory agency on the apparent ground that the absence of an administrative record precluded effective judicial review. In so doing, the court transformed one of the very bases for challenging the agency's action—lack of evidentiary support—into a reason for sustaining it. This ruling placed the lower court in direct con-

flict with governing decisions of this Court on the requirements of administrative adjudication and on the timeliness of judicial review. Grant of the petition for a writ of certiorari to review the decision below is plainly called for.

1. On its face, the decision below represents a rather clear departure from the usual course of judicial proceedings. While the lower court recognized that there was no evidentiary support for the Board's crucial finding of fact, it nevertheless *affirmed* the Board's order. To recapitulate: the agency action challenged in this proceeding was the Board's imposition of severe restrictions on its grant of exemption authority to two intrastate airlines—restrictions that would force these carriers to discontinue certain of their State-authorized services in order to obtain the benefits of the federal exemption. The sole basis cited by the Board for imposing these onerous restrictions was a finding that "air service at Lake Tahoe is interstate in nature by definition."

Neither in its order nor before the court below did the Board ever provide any factual support for that finding. What it did do, nine months later, was to institute a *Lake Tahoe Service Investigation* in which, it said, the parties could attempt to disprove its view as to the nature of air service at Lake Tahoe (Petition, App. 49-50). The Court of Appeals acknowledged that the Board had made its finding before it had any factual basis for doing so, and the court even granted that the Board's approach "suggests a predisposition that might lead observers to question the bona fides of the now pending inquiry into Lake Tahoe air service" (Petition, App. 6). In spite of these admitted defects

in the agency action under review, the court placed its imprimatur on the Board's decision by entering a judgment of affirmance.

In thus excusing the Board's failure to justify the action it took, the decision below was in direct conflict with a long line of decisions by this Court, perhaps best exemplified by *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947). There the Court summarized the applicable law to be

> that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. *If those grounds are inadequate or improper, the court is powerless to affirm the administrative action* * * *. [332 U.S. at 196; emphasis supplied.]

Having recognized that the grounds for the Board's decision were inadequate and improper, the lower court was "powerless to affirm the administrative action." Review by this Court is thus warranted, not only because the decision below cannot be reconciled with governing decisions of this Court, but also because the lower court's action in excess of its power calls for the exercise of this Court's supervisory authority over the federal court system.

2. The court below refused to review the Board's decision on the merits because, it declared, "The issue is presently too theoretical and abstract" (Petition, App. 7). The effect of the Board's imposition of the contested restrictions was hardly "theoretical" or "abstract." The Board explicitly directed the intrastate carriers to delete certain schedules they had been au-

thorized to operate by the California Commission (Petition, App. 29, n. 9). Compliance would have required these carriers to ignore their State-imposed service obligations, and in fact did cause PSA to abandon one of its State-authorized services. (Air California was able to avoid the discontinuation of such services only by forgoing the benefits of the Board's exemption.)

This Court held in the landmark case of *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-49 (1967), that an agency action is ripe for review when it "has been formalized and its effects felt in a concrete way by the challenging parties." The Board left no doubt that its action was a definitive one with which it expected compliance (see Petition, App. 29-30). Furthermore, the very real and practical effects of the Board's order have been felt for two years, and will continue to be felt indefinitely, not only by the California Commission whose regulatory actions have been frustrated, but also by the affected airlines and the traveling public. The lower court did not—nor could it—find otherwise.

The lower court found the Board's action unripe for review, not because that action lacked finality or had no practical impact, but because the Board later instituted an evidentiary proceeding that might generate support for the agency action (Petition, App. 6-7). In other words, the manifest lack of an evidentiary foundation for the Board's decision, which should have moved the court to *invalidate* the agency's order, became an excuse to avoid reviewing it—indeed, to *affirm* it. Such resort to the "ripeness" doctrine to forestall review of a formal, concretely prejudicial agency action cannot be squared with the salutary principles

laid down in the *Abbott Laboratories* case. Intervention by this Court is plainly called for.

CONCLUSION

The questions raised by the decision below go to the very heart of the federal administrative process. Here an agency has been allowed to shield a plainly defective action from judicial scrutiny simply by promising to substantiate it later on. If that is a course of conduct that is open to any federal agency, what remains of the requirements of reasoned administrative adjudication? And what remains of the parties' right to effective judicial review? These are important questions that deserve the attention of this Court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

J. William Doolittle
Prather Seeger Doolittle
Farmer & Ewing
1101 Sixteenth Street, N.W.
Washington, D.C. 20036

Boris H. Lakusta
Graham & James
One Maritime Plaza
San Francisco, California 94111

Attorneys for Respondent
Air California

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